MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing *and* United Association of Plumbers and Gasfitters, Local Union No. 34. Cases 18–CA–18216, 18–CA–18419, and 18–CA–18504

May 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On December 28, 2007, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing, North Branch, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. May 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Nichole L. Burgess-Peel, Esq., for the General Counsel.
Travis D. Stottler, Esq., Jonathan R. Cuskey, Esq. (Miller Law Office, P.A.), of Wyoming, Minnesota, for the Respondent.
Nicole M. Blissenbach, Esq. (Miller-O'Brien Cummins), of Minneapolis, Minnesota, for the Charging Party.

DECISION

Introduction

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve a small commercial and residential plumbing business operated from an office in North Branch, Minnesota, some 40 miles north of Minneapolis. Its three bargaining unit employees organized in November 2006. The General Counsel of the National Labor Relations Board (the Board) alleges that in November 2006, before recognizing the Union, the employer engaged in an unlawful interrogation and unlawfully threatened an employee. The General Counsel alleges further unlawful threats and directives in June 2007. Collective bargaining, which began in November 2006, stalled in May 2007, and the General Counsel alleges that since May 2007 the employer has unlawfully engaged in overall surface bargaining without intent to reach agreement. Finally, the General Counsel alleges that two of the bargaining unit employees were unlawfully discharged in June 2007, in retaliation for their protected activity regarding a pay dispute with the employer, and/or, alternatively, as part of an effort by the employer to thwart its bargaining obligation.

STATEMENT OF THE CASE

Based on unfair labor practice charges filed by the United Association of Plumbers and Gasfitters, Local Union No. 34 (the Union), the General Counsel of the National Labor Relations Board issued a consolidated complaint on August 31, 2007,[1] alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) against MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing (Ben Franklin or the Respondent). The General Counsel issued an amendment to the consolidated complaint on October 10 adding allegations that

[1] In affirming the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by discharging employees Steven LaMont and Donald Doty in retaliation for their protected activity in furtherance of a pay dispute with the Respondent, Chairman Schaumber finds it unnecessary to pass on the judge's alternative finding that, if LaMont's conduct at Teri Recht's home was an independent cause of his discharge, LaMont's discharge violated Sec. 8(a)(1) in any event because his conduct there was protected.

In the absence of exceptions, we adopt the judge's other findings that the Respondent violated Sec. 8(a)(1) and (5) of the Act.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[1] All dates are from 2007, unless otherwise indicated.

the Respondent violated Section 8(a)(1) and (5) of the Act. The Respondent filed answers to the consolidated complaint and to the amendment to the consolidated complaint denying all alleged violations. At the outset of the trial, the General Counsel orally moved to amend the complaint to add an additional allegation in support of the 8(a)(5) allegation. That motion was granted.[2]

This dispute was tried in Minneapolis, Minnesota, on October 16, 2007. Counsel for the General Counsel and counsel for the Respondent filed briefs in support of their positions on November 20. On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following

JURISDICTION

The Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the record, I also find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

FINDINGS OF FACT

A. Recognition of the Union

The Respondent operates two Benjamin Franklin Plumbing franchises from its office in North Branch, Minnesota. The Respondent's owner is Michael Mueller. In the fall of 2006, Mueller employed three plumbers in addition to office personnel. They were Steven LaMont, Donald Doty, and Keven Vandewetering. Mueller, himself a plumber, also performed plumbing and other service work for the business.

In the fall of 2006, Mueller hired a consultant to analyze the business and offer advice on changes that could be implemented to make the business more profitable. The conclusions (as set forth in R. Exh. 8) included pointed concerns about the productivity and efficiency of staff. A number of recommendations were proposed, including increased efforts to track and raise employee work efficiency.

In October 2006, Mueller sent LaMont on a "ride-along" with a plumber from a Ben Franklin franchise from the Twin Cities. Mueller wanted LaMont to see how this other company operated. It happened to be a union company and during their time together LaMont and his host discussed and compared their operations and terms and conditions of employment. The union company sounded "very attractive" to LaMont and ultimately the union employee provided LaMont with the name and number of Plumbers Union Organizer Gary Schaubschlager. LaMont contacted Schaubschlager and a meeting was arranged for October 25, 2006.

LaMont and Doty met with Schaubschlager at an area restaurant on this date. At the meeting they discussed the merits of unionization and the process of obtaining representation. Doty and LaMont signed authorization cards at this meeting. Vandewetering signed a card that was provided to Schaubschlager a few days later.

On the morning of November 1, 2006, Schaubschlager, accompanied by a union field representative, arrived at the North Branch Ben Franklin shop. Employees were leaving a weekly meeting when Schaubschlager entered the building. Schaubschlager introduced himself to Mueller and, holding up LaMont and Doty's authorization cards, announced that he was there to seek voluntary recognition of the Union.[3]

Mueller said, "Oh good, the Union's here. . . . Oh yeah we can talk about that." With regard to cards he said, "I don't have time to view them at this point in time, but we can get together this afternoon." Mueller retreated to his office. Schaubschlager followed him in and gave him and his secretary a business card. Schaubschlager left the office and saw Doty in the hallway as he emerged. Doty was moving between the garage and the storeroom in the hallway loading trucks. Mueller came out and said to Doty something to the effect of, "[d]id you sign on with the Union." Doty told him yes. Mueller said, "[f]ine, I can work here alone," and then stormed off through the garage toward the trucks.[4]

Schaubschlager reached Mueller the next morning and asked Mueller about the request for voluntary recognition. Mueller told him that "he was soon to be a unit of one and that he had no intention of having a union at his place of business." Schaubschlager replied, "Well, then I'll have to do what I have to do." Schaubschlager then filed a representation petition with the Board and an unfair labor practice charge.[5]

Prior to the hearing in the representation case scheduled for November 16, Mueller and Schaubschlager reached an agreement on the pending charge and petition. In exchange for withdrawal of the petition and the pending unfair labor practice charge, Mueller agreed to voluntarily recognize the Union. Schaubschlager faxed Mueller copies of the authorization cards and they had their first bargaining session on November 22, 2006.

On November 15, 2006, Mueller again conducted a weekly employee meeting. At the meeting, the employees watched a

[2] I note that throughout this decision references to "the complaint" are to the sum of the extant complaint allegations that are the product of consolidated complaint and the amendments thereto.

[3] Schaubschlager knew that Vandewetering was planning to give a 2-week resignation notice that day. He, therefore, "saw no reason to bring Keven into it . . . so I didn't display the card that Keven gave me."

[4] This account is based on the credited testimony of Schaubschlager and Doty. They provided mutually corroborative accounts of Mueller's conduct with straightforward and credible demeanor. Mueller's account was somewhat vaguer, and as he was wont to do, his testimony on this point rambled quite a bit. However, his version of events was not significantly in conflict with Doty and Schaubschlager's account, and he did not deny the conversation with Doty, or the comments attributed to him. Mueller added that he asked Vandewetering in the back of the warehouse, "Hey Keven, what's up with this," and that Vandewetering told him he signed an authorization card. I make no finding that Mueller unlawfully questioned Vandewetering about the union drive as his testimony was vague, confusing, and no one else (Vandewetering did not testify) referenced any such comment.

[5] The charge, assigned case number, Case 18–CA–18205, did not relate to the comments to Doty but, rather, to a claim that, after the demand for recognition by Schaubschlager, Mueller had told LaMont not to report for work the next day.

Ben Franklin instructional video, and marked Vandewetering's last day at work as a full-time employee. At the meeting, Mueller announced that in order to make the franchise more profitable he was "going to start to work in the field and jobs would trickle down from there." Previously, Mueller had performed mostly bids and made estimates for customers, performing plumbing jobs only when work was too busy for the employee-plumbers. At the meeting he announced that he would take service calls which would leave less work for LaMont and Doty.

Doty testified that after this point, his workload declined steadily and that by January "I was pretty much getting maybe one call, two calls a week, if that." LaMont also had less work and in February and had no work for some weeks, but in March he was recalled and began working steadily. Mueller testified that the business began to slow in the winter and there was insufficient work available to keep the employees busy during this time.

B. Bargaining

The parties bargained steadily from November 2006 through April 2007. During this time, Mueller and Schaubschlager met to bargain a total of 12 times, approximately every 1 to 3 weeks. In addition, sidebar meetings were held in which Mueller and Steve Pettersen, vice president of the Minnesota Mechanical Contractors Association, met with Stan Theis, the business manager of Local 34 of the Plumbers Union. Mueller's attorney at this time, Doug Seaton, also attended sometimes. Schaubschlager did not attend these sidebar meetings, but based on the testimony these meetings were ongoing and an important part of the process. Schaubschlager "felt that the negotiations were going quite well from where we started to where we ended up."

At an April 18, 2007 meeting, Schaubschlager offered counterproposals to Mueller's April 9 proposals. Mueller indicated he saw some problems with Schaubschlager's counterproposals but said he would look at them. According to Schaubschlager, Mueller said, "I'll get back to you." A meeting was scheduled for May 8.

Before May 8, Region 18 of the Board took action to dismiss various charges filed by the Union and pending against the Respondent. Previously, during the course of this bargaining, on November 28, 2006, the Union had filed an unfair labor practice charge, filed as Case 18–CA–18216, alleging several discrete unfair labor practices. This charge was amended on November 30, 2006, and again on January 26, 2007, and the Region issued a complaint on several allegations contained in this charge. However, on April 30, the Region withdrew the complaint and conditionally dismissed the charge, subject to reinstatement if additional unfair labor practices were alleged within 6 months.[6] At this time, the Regional Director also dismissed, unconditionally and on the merits, several other allegations contained in Case 18–CA–8216 as well as all the allegations contained in two other charges filed by the Union against the Respondent. Thus, the April 30 letter dismissed, either unconditionally or conditionally, all pending NLRB allegations against the Respondent.

Mueller failed to attend the May 8 meeting. After waiting half an hour Schaubschlager called Mueller and Mueller said, "Oh, did we have a meeting today?" Schaubschlager said yes. Mueller said that he had been waiting to hear from Pettersen. Schaubschlager told Mueller that "it is my understanding, or I've been led to believe, that Steve Pettersen is not willing to bargain on your behalf any longer." Mueller said that they would need to reschedule, and that he had to talk to Pettersen to find out what was going on. Asked how things were left, Schaubschlager testified that "[w]ell, I left it that for the time being because the—we had made the last proposals to him. We were waiting for a response. I saw no point in negotiating against ourselves." Schaubschlager testified that his "understanding" was that Mueller would be getting back to him after talking to Pettersen.

When Mueller got back to Schaubschlager by letter dated June 6, his response evinced an understanding contrary to Schaubschlager's. Mueller wrote:

> Substantial time has passed since our last conversation. At that time you said you would contact me to schedule future negotiations. You have not done so. I therefore conclude that the union is not interested in further negotiations.

Mueller testified that in the spring he met a lot with "Pettersen and Theis. They were—we were trying to put together a deal so we could go forward." He also testified that "[w]hen I called Pettersen, he told me that the Union wasn't interested anymore." According to Mueller, that is what prompted him to write the June 6 letter.

Schaubschlager responded by letter to Mueller dated June 8. He stated:

> At our April 18, 2007 meeting I provided you with our latest proposals. You indicated to me you were going to look them over and get back to me. We then scheduled a meeting for May 8 2007 and you failed to show up at that meeting.
>
> It is my understanding that Steve Pettersen is no longer interested in bargaining on your behalf and I stated that to you in our phone conversation in May. I have no reason to believe his position on the matter has changed.
>
> I intend to continue to bargain in good faith with you and hopefully we can come to an agreement satisfactory to both sides.
>
> I suggest you and I meet on Tuesday June 26 at Perkins in Forest Lake at 9 am. If this does not work for you please let knew and we can re-schedule.

Schaubschlager did not receive a response to this letter, and on that basis did not attend the meeting he scheduled for June 26. Mueller claimed to the Region in pretrial position statement that he attended the meeting, but Schaubschlager did not show, adding to his view that the Union had lost interest in

[6] In his letter withdrawing the complaint, the Regional Director stated that "the Charged Party has not otherwise violated the Act; the Charged Party voluntarily recognized the Union on [or] about November 15, 2006; the Charged Party has continued to bargain with the Union since that time; and approximately six months have passed since the Charged party's unlawful conduct occurred. In these circumstances, further proceedings are not warranted at this time."

bargaining. There was no further bargaining or attempts to schedule meetings until Schaubschlager's August 30, 2007 letter to Mueller stating that "I would like to resume our negotiations that have been absent since May."[7]

In his August 30 letter, Schaubschlager proposed that the parties meet September 18 at the Forest Lake Perkins at 9 a.m. This time, Schaubschlager wrote that "I expect you to RSVP me by September 14, 2007 if this date is acceptable or unacceptable to you." Schaubschlager included his phone and fax number in the letter. Having heard nothing from Mueller, on September 17, Schaubschlager wrote Mueller indicating that "[b]ecause I have not heard from you, I have concluded that you are refusing to bargain further with the Union." He added that, "[j]ust in case you change your mind and decide you are willing to bargain, I will be at the Forest Lake Perkins at 9:00 a.m. on September 18, 2007 as planned." That same day Schaubschlager filed a refusal to bargain unfair labor practice charge against Ben Franklin (assigned case number, Case 18–CA–18504). Mueller did not show up for the September 18, 2007 meeting. However, Mueller called Schaubschlager that afternoon or evening and told Schaubschlager that "he doesn't always get his faxes, that the best way to reach him is over his phone." Schaubschlager pressed Mueller for a meeting and Mueller said not until after September 26, the date on which the instant hearing was then scheduled to begin. The hearing was subsequently postponed and on September 24, Schaubschlager wrote Mueller proposing three potential dates for negotiations. Mueller agreed to meet October 2 at 9 a.m. He later rescheduled the meeting for 11 a.m. because of a doctor's appointment.

The morning of October 2, at about 10:30 a.m., Mueller's secretary contacted Schaubschlager and told him that Mueller was still waiting to see the doctor and Schaubschlager asked her to have Mueller call when he was finished at the doctor. Mueller called at about 11:45 a.m., and asked if they could meet at 2 p.m. Schaubschlager, who was waiting at the Perkins restaurant, insisted that Mueller meet him, and Mueller arrived at the meeting at about 12:15 p.m. They met for approximately 45 minutes, which was the typical length of their bargaining sessions. Mueller arrived without proposals, or even a notepad, but when Schaubschlager remarked upon this, Mueller pointed to his head and declared that "I have it all up here." According to Schaubschlager's account of the meeting, they reviewed the Union's proposals and discussed the "hang ups" the parties had on particular proposals. During the meeting Schaubschlager asked Mueller about the Union's request for information mailed to Mueller on September 26. Mueller stated that he had received it and that the information was being complied and would be sent to Schaubschlager. The Union proposed meeting again on October 15 and Mueller said that he would prefer to meet October 23.

By letter dated October 4, the Union submitted a proposal to Mueller for an agreement, including settlement of all unfair labor practice charges.

By letter dated October 4, 2007, in a position statement submitted to NLRB Region 18 regarding Case 18–CA–18504, Ben Franklin's counsel stated that "while my client has not completely ruled out future negotiations with the Union, he will refrain from negotiating with the Union any further until the charge filed against him by the NLRB for refusing to negotiate is addressed and resolved." This was reiterated and expanded in an October 12 letter to the Region in which counsel for Ben Franklin declared that Mueller would not negotiate with the Union "until the charges filed against him by the NLRB with respect to Cases 18–CA–18504, [18–CA–]18216, and [18–CA–]18419 have been resolved."

C. Doty's Termination

Doty, a licensed master plumber, was hired by Mueller to work at Ben Franklin on July 6, 2006. As discussed above, after recognition of the Union, Doty's work hours began declining and by January 2007 he was getting one or two calls per week. The reasons for this are not directly at issue in this case, but provide background. Mueller maintains that Doty was hired to build business for a new St. Cloud area franchise and his failure to do that meant that Doty, as last hired, would have the last pick of work available in the North Branch area. This, along with the increase in the number of plumbing jobs that Mueller personally performed, and a general seasonal decline in business, left Doty with little work. Clearly, he was the last choice for service work after January. Given Mueller's comments after the union drive, one cannot help but wonder about the motive for the diminishment of work. I note, however, that Region 18 declined to bring to trial charges filed by the Union over Doty's reduction in hours. (GC Exh. 4.)[8]

After April 30, 2007, Doty continued to receive few, if any, work calls from Ben Franklin. In the first week of June, LaMont told Doty that he believed hours were missing from his pay and that he had asked for his timesheets. LaMont told Doty that the Respondent's administrative assistant, Patti Norrgard, had said that Mueller had changed the timecards and that LaMont would have to take it up with Mueller. LaMont told Doty that he too should request his timesheets to "double-check to make sure [Doty] wasn't shorted any hour or time." Doty told LaMont that he should take criminal action against Mueller and that he should call Schaubschlager.

On Thursday, June 7, Doty called Ben Franklin and requested his timecards in a conversation with Patti Norrgard. Doty told her that LaMont had said there were some questions on this and that he wanted to check his. In this conversation Doty asked Norrgard how business was and told her "basically my truck hadn't moved for a month and grass was growing around it so I had to move it for mowing and stuff."

The next day, Mueller stopped LaMont in the hallway at work and told LaMont that Doty had called and asked for his

[7] Schaubschlager's renewed interest in bargaining coincided—surely not coincidentally—with Region 18's decision, announced in an August 30 letter from the Regional Director to prosecute the Respondent for the discharge over the summer of Doty and Lamont (to be discussed in detail below) and to revive and issue a complaint on the allegations against the Respondent that were conditionally dismissed on April 30.

[8] LaMont's hearsay testimony that dispatcher Elizabeth Hatch told him in May 2007, that "[w]hen I was hired, I was specifically told not to give Don any service calls," is plausible, and not surprising, but does not further elucidate the motive for limiting Doty's work.

timecards. Mueller told LaMont "to no longer talk with Don about this issue and also he was gonna pick up Don's truck from his house and not to inform him or let him know about this."[9] That day, Mueller called Doty and left a voice mail stating that he would come by Doty's house and pick up the Ben Franklin truck. On Saturday, June 9, Mueller picked up the truck. On Thursday, June 14, he wrote Doty:

> On Saturday June 10, [[10]] 2007, I came to your home to pick up the Ben Franklin Plumbing truck. In the truck, I found your uniforms and cell phone, which I also took away with me. Because you left those items in the truck, I assume that you are resigning from your position with Ben Franklin Plumbing.

The letter also contained forms and information regarding Doty's right to choose COBRA coverage to continue his health insurance.

Approximately 1-week later, Doty called Mueller and said that, contrary to Mueller's letter, he was not resigning. Doty told him that he put the uniform and company phone "in the truck to keep it together" but that he was not quitting. Mueller acknowledges that he probably responded by saying, "Ok." However, on approximately June 26 or 27, Mueller called Doty and told him that his services were no longer needed. He told Doty to remember to sign up for COBRA because his health insurance would expire at the end of the month if he did not.

No explanation was provided to Doty about the grounds for the termination. Mueller maintained at trial that the motivation for terminating Doty was his solicitation of work while on a service call for Ben Franklin. Doty did not dispute, and essentially conceded, the events described by Andrew Fiedler, who in March 2007, was the chairman of the board of trustees of the American Legion Post in Cambridge, Minnesota. On March 9 or 10, Fiedler and his manager called Ben Franklin seeking plumbing help with some toilets. Doty received the assignment and went to the American Legion building. When he arrived, Fiedler mentioned that the Legion was planning to get bids to do remodeling, but that more immediately he needed the toilets fixed. Doty fixed the toilets, but in reference to the remodeling job, Fiedler testified that Doty told him:

> "Well, if you plan on getting a bid from Ben Franklin, you can expect to pay 10 to 15 percent more just to have that big, blue piece of shit pull up," and then he pointed out the window to the Benjamin Franklin truck, which is blue.

Doty also told Fiedler that "he hadn't worked, hadn't been called out to a job since January, I believe he said, and that now that Mike and the other guy that are taking up all the jobs don't want to do this shitty job, they call me finally." Towards the end of the service call, Doty told Fiedler that "[i]f you have Mike . . . come out and bid the job, you know, you can expect a 10 to 15 percent markup and the job will be half-assed. I can do it better if you want to get a bid from me . . .instead." Doty told Fiedler that he was "working on the side" but that his employer was not aware of it. Doty provided Fiedler with a business card—not a Ben Franklin card, but a card referencing a company with Doty's name.[11]

A few weeks later, during the second week of April, Fiedler called Ben Franklin and asked for someone to come to the Post to give him a bid on the remodeling job. Later in April, Mueller came to review the proposed job. While Mueller was there, Fiedler gave him the card Doty had left and told Mueller about Doty's comments.[12]

There can be no doubt that Mueller was concerned about the potential for plumbing employees to generate work for themselves while on the job for Ben Franklin. Indeed, Mueller required Doty and LaMont to sign "noncompete" agreements when they took the job with Ben Franklin. Mueller's insistence on these agreements conclusively demonstrates his concern with the issue of soliciting work on the job, a concern that preceded any events in this case. However, when Fiedler reported Doty's conduct to Mueller, Mueller said nothing to Doty about the incident, or about the "noncompete" agreements. Mueller took no steps to discipline or terminate him Doty. Rather, he "just never called him back in to work." According to Mueller, "[i]n my mind he was terminated, officially on paper he wasn't terminated."[13]

D. LaMont's Termination

LaMont was hired by Mueller at Ben Franklin in July 2005. He worked as a plumber performing service work, repairs, remodeling, drain cleaning, and some new construction work. LaMont was terminated June 12, 2007, during a contentious meeting with Mueller about Mueller's practice, discovered by LaMont a couple of weeks earlier, of altering LaMont's timecards and paying him for less time than LaMont submitted on his pay cards. As discussed below, Mueller believed that LaMont's timecards overstated his compensable time. The termination also followed, by one day, an incident at a customer's house, reported by the customer to Mueller, in which LaMont complained to the customer about Mueller's pay practices and showed some of the disputed timecards to the customer.

Beginning in January 2007, LaMont's hours of work had declined, and by February LaMont considered himself "laid off."[14] During the 2-week period he was laid off, LaMont took

[9] LaMont's account of this conversation was not disputed by Mueller and it is credited.

[10] The actual date was Saturday, June 9.

[11] Fiedler's dislike of Doty was evident in his testimony. In certain circumstances that might give me pause in assessing credibility. However, Doty essentially admitted many of the comments Fiedler attributed to him, directly admitted he "probably" or "might've" said other comments attributed to him by Fiedler, and disputed none of Fiedler's testimony. Accordingly, I credit Fiedler's undisputed account of the incident. I note that Doty was present in the hearing room during Fiedler's testimony.

[12] Fiedler testified that Mueller had reviewed the job in early May, but I find he was mistaken. Mueller's testimony that he reviewed the job in April is consistent with the April 30 date on the bid proposal, which, in accord with Mueller's testimony, would have been prepared after Mueller visited the site to learn the details of the job.

[13] Asked by Ben Franklin's counsel "[w]hy did you not explain to Mr. Doty the reasons why he was being terminated," Mueller answered: "That's a good question. I don't know."

[14] Mueller asserted that it was not "an official layoff," but rather, "[i]t was we don't have enough work." However, he also referred to it

a plumbing job with Rooter plumbing. In March, upon his resumption of work with Ben Franklin, LaMont received a "last chance warning" memo. As the basis for the warning the memo cited the inadequate quality of LaMont's work on a job in October, and the complaint by the customer at this job that LaMont solicited business for himself from the customer's girlfriend. In addition, the memo upbraided LaMont for taking the job with Rooter. The memo termed LaMont's conduct "unacceptable" and stated that "[a]ny further misconduct of any kind will result in immediate termination."[15]

The Respondent's plumbers were paid on an hourly basis for work performed during 2-week pay periods. The employees filled out and submitted daily timecards setting forth hours worked. In addition, when they moved from service call to service call during the day the plumbers would call in to the office and an office employee would record the time they started and completed jobs. These were entered into a computer and Mueller used these calculations as the basis for calculating hours worked for pay purposes. Mueller testified that the manual timecards submitted by employees provided certain inventory information but in terms of calculating time, were more of a backup to the information entered into the computer. In the fall of 2006, then office administrator Amanda McAllister was approached by either Mueller or Norrgard about potential discrepancies between the timecards submitted by LaMont and the times recorded in the computer by McAllister. McAllister told Mueller and/or Norrgard that they needed to go over the timecards and computer information with the plumbers. McAllister testified that a cause of the discrepancies in LaMont's case was the times when LaMont would indicate he was going to put, for example, 3:15 p.m. on his timecard which would include time for him driving to next job, while McAllister would enter 3 p.m., which was the time she believed he finished the job. By the end of the fall McAllister says that this was happening daily and she talked with Mueller about it monthly in the fall of 2006.[16]

In early May it occurred to LaMont that his paychecks were less than they had been in the past. He requested that Norrgard review the payroll figures for that week. She did and told LaMont that everything was correct. LaMont still thought "it didn't seem right to me, so I started keeping track . . . . of my time." He did this for the pay period covering May 5 thru 19. Employees were paid approximately 2 weeks after the end of a pay period so LaMont was paid for the May 5 thru 19 period on approximately June 1. When he got his paycheck he compared it to the time he had recorded and found that he had not been paid for approximately 11 hours he had recorded as worked over the 2-week pay period. This prompted LaMont, on June 1, to request from Norrgard copies of his timecards he had submitted for the pay period covering May 1 to 18. When she provided them to LaMont it appeared that on some of the timecards the hours he had submitted had been circled and a lower number of hours written in. LaMont was paid for the lower number of hours written in.

When LaMont saw this, he called Mueller on June 5. LaMont said, "Mike, what's going on," and Mueller expressed chagrin over the situation. According to LaMont's undisputed (and credited) testimony, Mueller told him: "I'm a Christian man. I know I shouldn't have been doing this and I have a bitter taste in my mouth about the union situation." LaMont responded, "Mike, if I was stealing from you over the past two years, by now I should've been fired."

The next day, June 6, LaMont wrote a note to Mueller requesting copies of his timecards since his date of hire. In his letter LaMont said he wanted to be "paid back for the time taken off my timecards by the end of next week 6–15–07." LaMont added that

> When I was hired I was told by Mike, I was an hourl[]y employee. Mike also said the work day is [from] **8–5 and paid drive time**. (Original emphasis.)[17]

After writing this letter LaMont approached Norrgard seeking access to his personnel file. This enabled LaMont to see many (but not all) of his past timecards and it appeared to LaMont that the changes to the timecards had been going on for some time. According to LaMont, Norrgard confirmed this, saying, "I had nothing to do with this. Mike's been doing this ever since January."

As discussed, above, LaMont talked to Doty and got him to request pay cards. LaMont told Doty that his timecards had been altered and that Doty should also check to see if it had been happening to him. In addition, LaMont left a message

as "that layoff time" and approved of LaMont attending school for a week during this time.

[15] It is worth noting that at the hearing LaMont vehemently denied the assertions that he had ever solicited work for himself, including the time described in the memo. He also stated that he worked for the other plumbing company for 2 weeks when laid off from Ben Franklin and that Mueller was aware of it. He testified that he was ready to resume work at Ben Franklin "[b]ut I didn't know if he was firing me permanently because what happened with Don Doty." Unfair labor practice charges filed over the warning given to LaMont were investigated and dismissed by the Region on April 30 because, according to the dismissal letter, "there is insufficient evidence to establish a prima facie case that the warning was motivated by LaMont's union activity."

[16] McAllister left full-time employment with Ben Franklin in January 2007 and worked only 4–5 days total after that through the spring of 2007.

[17] I note here that the issue of whether "drive time" to and from jobs was to be included in compensable hourly pay appears to have been at the bottom of the pay dispute. Mueller testified that this was the source of the discrepancy between the hours he paid LaMont and the hours submitted by LaMont on his timecard. Mueller's position was that compensable time began when a plumber arrived at his first job, not when he left home to drive to the job, and did not include driving to and from jobs. According to Mueller, both the issue of timecards not matching the computer records, and the issue of drive time compensation were repeatedly addressed in employee meetings. LaMont seemed unaware of this and contended that when he was hired he was told that drive time was to be included. Although less than pellucid, based on Mueller's testimony, I conclude that a change in the drive time rule, or at least a change in the enforcement of the rule, began sometime after the consultant's report, probably around January when the evidence (albeit hearsay and circumstantial) suggests that Mueller began changing timecards.

with Vandewetering suggesting that he should do the same.[18] Doty suggested that LaMont should contact Schaubschlager and he did that too. Doty also suggested that LaMont "should contact the authorities," i.e., the police, about the pay discrepancy, advice that, as discussed below, LaMont eventually followed.

On Friday June 8, Mueller told LaMont not to talk to Doty about the timecard issue and told LaMont he was going to pick up Doty's truck, but not to let Doty know this.

On Monday June 11, LaMont was assigned a service call at the home of Teri Recht. In February 2007, Recht, a small business owner, joined a business networking group of which Mueller was a member. She saw Mueller at the group's weekly meetings, and through these meetings the two had exchanged referrals. Recht needed some plumbing work done on pipes in her backyard shop in the "pole barn," and some additional work in the kitchen of her house. She contacted Ben Franklin (probably through Mueller), and LaMont came to her house June 11. She had met him once before on a previous service job. While LaMont was working on the sinks in the house Recht was making breakfast and after asking her employee if she wanted breakfast, Recht asked LaMont if he wanted some. LaMont said he did, and thanked Recht profusely, commenting that "he couldn't believe somebody would ask him to do that." While they ate, Recht asked him how he like working for Mueller. According to Recht, "He didn't respond about Mike. He just said that he would like to work for someone that was honest and something about integrity." LaMont repeated these comments several times over the course of the morning and explained to Recht about the timecard issue. Later, LaMont was leaving and came back inside to get payment from Recht. They talked some at the door, and LaMont asked Recht if she wanted to "see the timecard that was altered." Recht went out to his truck and "then he pulled out his timesheets and he explained that Mike had not paid him for certain hours and that there was something about a plumbing part that supposedly Steve had took from a house that I didn't really understand because it had nothing to do with me, but so he thought that Mike was not paying him for what he deserved." LaMont's disclosures, no doubt encouraged by Recht's hospitability, did not go over well with Recht. "I really didn't want to hear about it, and so I pretty much left."[19]

Recht was upset, specifically with the fact that LaMont had shown her the timecards, and she told Mueller about it the next morning at their business networking meeting. According to Mueller, Recht told him that LaMont said he was a "crook and that you ripped him off with his timecards" and that he had shown her the timecards. Recht specifically denied telling Mueller that Lamont used words like "crook" or "liar" in describing the incident to Mueller. She testified that she told Mueller that LaMont had said that he "wanted to work for somebody that was honest and had integrity." I credit Recht's account, although I do not doubt that in discussing the incident with Mueller, Recht's (completely reasonable) impression that LaMont questioned Mueller's ethics with regard to the pay issue was conveyed to Mueller.[20]

LaMont began the morning of June 12 by selling "a well job" on his first call. Mueller was excited to learn about this, which suggests that he had not yet talked to Recht when LaMont called in to report the sale. LaMont was sent to another service call, and planned to return back to install the well job when Elizabeth Hatch, from Mueller's office, called and told him stop at the office before going to complete the well job. When LaMont arrived she told him to go into the back office room. Mueller was sitting at the table with papers and timecards in front of him. He told LaMont, "I want you to sit down and go through these timecards, initial off on them stating that they're okay."

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[18] As referenced, Vandewetering had left full-time employment with Ben Franklin in November 2006, but, in fact, continued to work on an "on-call" basis.

[19] I found Recht to be a highly credible witness. She gave her account without exhibiting any animus toward LaMont, or any effort to color her account to suit any party, or to justify her decision (discussed below) to report the conversation to Mueller. In any event, for the most part, Recht's account was not in conflict with LaMont's, who also testified to events at Recht's home. The discrepancies were minor. LaMont described being moved by Recht's kindness in serving her own employee breakfast and testified that he told Recht that "[i]t means a lot, you know, when you show, you know, the gratitude towards your employees." Consistent with Recht's account, LaMont testified that it was Recht's questioning of how things were going at work, combined with her informality and hospitality, that led him to make "small talk" that included his concerns with how things at work were "kinda uneasy, on the edge right now." The "major" conflict in their testimony is that Recht testified that LaMont did not mention the timecards until he was at the door to collect payment, while LaMont testified that he mentioned it during breakfast, and at the door asked if she wanted to see them. Both Recht and LaMont were credible witnesses. I do not think it particularly significant but on this discrepancy I credit LaMont over Recht, only because the conversation and the timecard dispute has had more meaning for LaMont than for Recht. It is entirely possible that Recht never heard the reference to timecards during breakfast. Although LaMont did not pick up on it, Recht did not really want to hear "how things were going at work" when she asked.

[20] At Mueller's request Recht prepared a written account of the incident on July 24, nearly 1-1/2 months later. In that statement she attributed to LaMont the statement that "Mueller was a dishonest employer that was trying to rip him off." At the hearing, Recht denied that LaMont used the words "rip him off" and did not recall him using the word "dishonest." Essentially, Recht's testimony suggests that the July 24 statement was her impression and characterization of what LaMont had meant, not what he actually said. The statement does raise the possibility that that in reporting the incident to Mueller on June 12, she reported her impression of LaMont's comments, which were more pointed than the language that LaMont actually employed. However, the statement, written at Mueller's request 6 weeks after the incident, does not support Mueller's account that Recht told him that LaMont said that he was a "crook" and a "liar." Recht adamantly denied telling Mueller that. For reasons Recht described, she felt that telling Mueller about the incident, particularly Lamont showing her the timecards, was the right thing to do. However, my impression is that she undertook this self-assigned task with a feeling of responsibility, and perhaps even reluctance that would not allow her to exaggerate LaMont's comments when reporting to Mueller. Mueller may have felt like he was being called a "crook" and "liar" when he heard Recht's report. I find she did not tell Mueller that LaMont said that. I credit her testimony that she told Mueller what LaMont said. However, I allow for the possibility that her impressions of the incident—i.e., that LaMont felt that Mueller was dishonestly ripping him off—were conveyed.

LaMont began to review the timecards. The first one had no changes from what LaMont had submitted and he initialed it. The next one had his hours circled and a new figure written in. LaMont indicated he did not want to initial it. Mueller raised the issue of drive time not being included in compensable hours.

At that point LaMont stood up announced that he wanted a third party to be present for this meeting. LaMont started to exit the room. Mueller asked him, "[W]here are you going?" LaMont said, "I want to go to my next job." Mueller said, "[n]o, it's your job assignment to sit down and go through all these timecards and initial off on them." LaMont resisted, and said, "No . . . I want to go to my next job" and insisted that he did "not want to go over 'em, not unless I have a third party there." Mueller said, "I'm ordering you and I'm demanding you to go in the office and initial off on these stating that these timecards are right. I'm not paying you another dime until you do this." LaMont said, "Well, sounds to me if you're not gonna pay me another dime, you're firing me." Mueller said, "I'm not firing you, I'm laying you off then." LaMont was preparing to leave despite Mueller's directive when Mueller raised the incident at Recht's home. Mueller said, "What you did yesterday, that was stupid." At first LaMont either did not know what Mueller was referring to, or pretended not to, but after Mueller pressed the issue, saying that LaMont knew what he was referring to, LaMont said, "Yeah, I showed her the timecards." At that point, Mueller said, "All right, you're fired. Get out of my office. Get out of here now." LaMont walked back into the meeting room in an effort to retrieve his timecards. However, Mueller took them off his desk and ordered LaMont off the property. LaMont called the police. He filed a complaint in an effort to obtain his timecards, but according to the police report, Mueller did not have them all available and the police convinced LaMont to leave without the timecards. That same day, June 12, Mueller wrote a letter "To Whom It May Concern," a copy of which was sent to LaMont, Seaton, and Schaubschlager, stating that LaMont was being terminated because of "clear evidence" that Mueller characterized as LaMont "actively discrediting Mueller's Ben Franklin Plumbing Co. and Mike Mueller himself." According to the letter, Recht had reported to Mueller that LaMont had said that "Mike Mueller was cheating him by taking time off on Steve's timecards, and that Mike was crooked. Steve then took out copies of his timecards and actually showed them to the client, in an attempt to make his case."

E. New Employees Hired

With LaMont and Doty's termination, Ben Franklin had no full-time plumbing employees, although Vandewetering remained a part-time bargaining unit employee. Three additional full-time employees' plumbers were hired in the next months. Ryan Green, an apprentice plumber was hired at the end of July 2007. Keith Betters, who specialized in drain cleaning, was brought in to do drain cleaning in August. In early September, Russell Newcomb, an apprentice plumber was hired, and he was assigned to develop the St. Cloud franchise business, a responsibility that Doty had maintained.

Legal Analysis

A. Alleged 8(a)(1) Threats and Questioning (Paragraph 5 of the Complaint)

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]." 29 U.S.C. § 158(a)(1). Section 7 of the Act protects employees' right to engage in "concerted activity" for the purposes of "collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. In the complaint, the Government alleges that certain comments made to employees by Mueller violate Section 8(a)(1) of the Act. I consider each, below.

1. November 1, 2006
(Paragraphs 5(a) and (b) of the complaint)

The General Counsel alleges that Mueller's comments to Doty on November 1, 2006, immediately after being confronted with the Union's demand for recognition, violated the Act. To review, after Schaubschlager held up two union cards (Doty's and LaMont's) and demanded union recognition, Mueller, without examining the cards, retreated to his office and then, telling Schaubschlager he would contact him later, exited his office and headed to the garage. In the hallway he encountered Doty. Mueller said something to the effect of "[d]id you sign on with the Union." Doty told him yes. Mueller said, "[F]ine, I can work here alone," and then walked off through the garage toward the trucks.

The General Counsel contends that Mueller's first question to Doty—"did you sign on with the union"—constituted unlawful interrogation. The General Counsel alleges that Mueller's second comment, made after Doty indicated that he had "signed on" with the Union—"fine, I can work here alone"—constituted an unlawful threat to reduce hours for Doty and other employees because of their choice of union representation.

The Board has identified a number of factors that are "useful indicia"[21] in determining whether the questioning of an employee constitutes an unlawful interrogation,[22] however, there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984),

[21] *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), quoted approvingly in *Westwood Health Care Center*, 330 NLRB 935, 939 (2000).

[22] These include the "*Bourne* factors," enunciated in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), and set forth in *Westwood Health Care Center*, supra at 939:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB at 939. Rather, the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985).

If Mueller's question to Doty—"did you sign on with the union"—could be isolated from his followup remark—"fine I can work here alone"—there might be a colorable argument that this one question was not coercive.[23] While Doty was not yet an open union supporter, this event occurred at a time when Schaubschlager was, presumably with Doty's consent, trying to show Mueller the union authorization card Doty had signed. Moreover, the questioning was not persistent or repeated, and took place in an open hallway. While Mueller was the head of the company, he was also someone who worked daily with Doty. But Board precedent counsels that the interrogation must be considered under all the circumstances. Here, the circumstances include the critical fact that the sole identifiable purpose for Mueller's question to Doty was as a predicate for, and part and parcel of a crude and obviously coercive threat to eliminate work for or fire Doty and others, precisely because of his affirmative answer to the question of whether he had "signed on with the union." The second comment by Mueller, almost in the same breath as the first, was a straightforward barely veiled threat of job loss for "signing on with the union" and would undoubtedly have a tendency to interfere, restrain, and coerce Section 7 rights. Thus, "the questioning did not occur in a context free of other coercive conduct" (*Demco New York Corp.,* 337 NLRB 850, 851 (2002); see *Millard Refrigerated Services,* 345 NLRB 1143, 1146–1147 (2005)). Rather, it occurred as a constituent, inextricable part of a threat of job loss. While the conversation might have been impromptu, there was nothing causal or accidental about it. Under the circumstances, the interrogation, like the threat of job loss, was highly coercive and violated Section 8(a)(1) of the Act as alleged.

2. November 15, 2006
(Paragraph 5(c) of the complaint)

The Government also alleges that at the November 15, 2006, employee meeting Mueller unlawfully threatened to remove bargaining unit work from employees and assign it to himself, thereby reducing employees' work hours, if employees chose union representation.

Certainly, the evidence does not show any explicit comment to this effect by Mueller. Rather, the evidence shows only that at this meeting, Mueller announced that in order to make the franchise more profitable he was "going to start to work in the field and jobs would trickle down from there." Is this an implicit threat? Obviously, the fact that Mueller's initial response to learning about the union drive 2 weeks earlier was to tell Doty, "[F]ine, I can work here alone," gives legs to this allegation. However, other factors do not support the claim. In coming months employees' hours, particularly Doty's, were reduced, yet the Government does not allege that the reduction in hours was unlawfully motivated. Indeed, a charge to that effect was dismissed, based, in part, on the legitimacy of the consultant's study, commissioned by Mueller prior to any union activity that supported the legitimate need for extensive changes in employment practices. It is incongruous for the General Counsel to contend that Mueller's statements that he intended to increase his own service work and reduce employees' work was reasonably and objectively an implicit threat of retaliation for the union campaign, yet accept that Mueller's institution of this operational change was a legitimate business-motivated action. The evidence does not show that the statement of intention to change operating procedures was an implied threat of retaliation for the union campaign.[24]

3. June 5
(Paragraph 5(d) of the complaint)

The Government alleges in paragraph 5(d) of the complaint that the "Respondent, in a telephone conversation with an employee, threatened the employee that Respondent was reducing the employee's hours reported on the employee's timecards because of the employee's support for the Union."

The complaint references the comment made by Mueller to Lamont when LaMont telephoned on June 5, after learning about the altered timecards. Lamont said, "Mike, what's going on." Mueller expressed chagrin over the situation. According to LaMont's credited testimony, undisputed by Mueller, Mueller told him: "I'm a Christian man. I know I shouldn't have been doing this and I have a bitter taste in my mouth about the union situation." LaMont responded, "Mike, if I was stealing from you over the past two years, by now I should've been fired."

I do not believe that it has been proven that Mueller changed the timecards in retaliation for the employees' union activity. Rather, Mueller believed that LaMont was filling out his timecards wrong. He believed that driving time should not have been included in compensable time and he believed LaMont was including it. He also had been told by dispatcher Amanda McAllister that drivers were not putting the same time on their timecards as she was submitting to the software program tracking hours. That is what led Mueller to alter the timecards.

[23] Although, in general, it is unlawful for an employer to inquire as to the union sentiments of its employees. *President Riverboat Casinos of Missouri,* 329 NLRB 77 (1999).

[24] I recognize that Mueller testified that the business operations consultants he hired to review his operation suggested he work less, not more, in the field. This would seem to undercut use of the study as a rationale for Mueller's decision to work more in the field. But if Mueller was told this, the advice is not contained in the consultants' written report which does not contain such a recommendation. That report stands as strong evidence—preexisting any union activity—of a legitimate motive for significant changes in employment practices by Mueller. That Mueller, a master plumber himself, decided to cut costs by increasing his work in the field, even if the consultants did, as he testified, suggest otherwise, falls short, in my view, of proving that the announcement of the decision implied a link to union activity. The General Counsel cites *Shaw, Inc.*, 350 NLRB No. 37 (2007), but in that case the threat to reduce the work force and give employees less hours if the employees unionized was an explicit threat. That such a threat is unlawful is not in doubt. But I find that in this case the threat was not shown to have been made.

Having said that, Mueller's statement drew an express link between his lingering anger over the employees' decision to unionize and his alteration of the timecards. As reflected by his comments and reference to his religious faith, Mueller believed it was wrong that he had changed the timecards without talking to LaMont about it, and he was worried about having done it, and the repercussions that could result. Regardless of his true motivations for altering the timecards, Mueller's attempt to explain his actions by explicit reference to the "bitter taste" left from the union campaign would reasonably tend to interfere with the exercise of protected activity. It is settled, of course, that in determining the coerciveness of remarks, the Board applies an objective standard and evaluates whether the remarks reasonably tend to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remarks or their actual effect. *Miller Electric Pump & Plumbing,* 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998). See *Postal Service,* 350 NLRB No. 43, slip op. at 5 (2007) ("Although we are mindful of the personal animosity between McCann and Gill, McCann's statements were clearly and directly tied to Gill's protected conduct, and would reasonably tend to interfere with Gill's exercise of his protected Section 7 rights") (footnotes omitted). Subjective motives aside, the objective and reasonable understanding of Mueller's comment would be that the timecard alterations are a consequence of the union activity. That is, obviously, a message that violates Section 8(a)(1) of the Act.

4. June 8
(Paragraph 5(e) of the complaint)

The General Counsel alleges that the Respondent violated the Act by instructing an employee that he was not to discuss pay issues with another employee.

The undisputed and credited evidence is that after LaMont called Doty to tell him about the timecards Doty called Ben Franklin and requested his timecards in a conversation with Norrgard. He told her that LaMont had said there were some questions on this and that he wanted to check his timecards. Subsequently, on Friday June 8, Mueller stopped LaMont in the hallway and told LaMont that Doty had called and asked for his timecards. Mueller told LaMont, "[T]o no longer talk with Don about this issue and also he was gonna pick up Don's truck from his house and not to inform him or let him know about this."

Thus, consistent with the Government's allegation, the evidence is clear that Mueller told LaMont not to talk further to Doty about this pay issue. This is unquestionably violative of Section 8(a)(1) of the Act. *Triana Industries,* 245 NLRB 1258 (1979).

B. Alleged Bargaining Violations
(Paragraph 16 of the Complaint)

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "Good-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective-bargaining contract.'" *Public Service Co. of Oklahoma,* 334 NLRB 487 (2001) (quoting *NLRB v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960)), enfd. 318 F.3d 1173 (10th Cir. 2003)). "In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co.,* supra at 487 (internal citations omitted). From the context of a party's total conduct, the Board determines whether the party is "unlawfully endeavoring to frustrate the possibility of arriving at any agreement." Id.

The Government contends that since May 8, the Respondent has failed to bargain in good faith as required by Section 8(a)(5) of the Act. Specifically, the Government alleges that the Employer engaged in surface bargaining that did not satisfy its statutory duty to bargain.

I find the evidence lacking to support the complaint allegations that the Respondent engaged in a course of surface bargaining.

The General Counsel (and the Union) accepts that the parties bargained steadily, and lawfully, from the November 2006 recognition of the Union through April 2007. According to the General Counsel, this changed after the Region withdrew pending complaints and dismissed pending charges against the Respondent on April 30. After that point, bargaining stalled. The General Counsel blames this on the Respondent, and suggests that its new, unlawful, attitude toward bargaining was the result of it being freed up from the threat of litigation by the Region.

There is no question but that bargaining ground to a halt after the April 18 bargaining session, but the evidence does not demonstrate that this was as result of a surface bargaining on behalf of the Respondent.

It is true that Mueller failed to appear at the next meeting, scheduled for May 8. But when Schaubschlager called Mueller, Mueller seemed surprised about the meeting, and told Schaubschlager that he was waiting to hear from Pettersen, the Minnesota Contractors Association vice president who had been bargaining with Mueller on behalf of the Respondent. Schaubschlager told Mueller that he thought that Pettersen was not going to bargain on behalf of the Respondent anymore. Mueller said that they would need to reschedule, and that he had to talk to Pettersen. Neither Pettersen, Theis, nor Seaton testified at the trial, and neither Mueller nor Schaubschlager provided much information about these side bar meetings. From this May 8 exchange, however, we can see that both the union and the employer were involved in back channels that impacted the negotiations in ways that the record does not make clear. In any event, for reasons related to the back channel, Mueller missed a scheduled meeting. At that point, rather than scheduling a new meeting, Schaubschlager and Mueller waited for each other. Schaubschlager testified that it was his "understanding" that Mueller would get back to him after talking to Pettersen, but there was no clear agreed plan on how to proceed next. The predictable result was that both parties waited for the other and blamed each other for the delay.

Nearly a month later, Mueller writes to Schaubschlager blaming Schaubschlager for not contacting Mueller to schedule further negotiations. Based on information from the back channel, Mueller testified that he had heard that the Union had lost interest in negotiations. Schaubschlager responded quickly, writing Mueller June 8 to contradict the assertion in Mueller's letter that the delay was his fault. He suggested a meeting for June 26. Mueller did not respond, and Schaubschlager did not show up for the meeting.[25]

One can certainly detect a less than enthusiastic approach to bargaining by Mueller. However, after May 8, Mueller's lack of enthusiasm was largely acceded to by Schaubschlager. Hearing nothing from Mueller in reply to his June 8 letter, Schaubschlager did not show up for the June 26 meeting. Nor did he attempt to contact Mueller, or attempt to schedule a meeting, or take any steps to put the process back on track for nearly three months, when, on August 30 he wrote to Mueller stating that "I would like to resume our negotiations that have been absent since May."

At the trial, Schaubschlager attributed the delay in requesting additional bargaining to the discharge of LaMont and Doty, and the attendant filing of charges against Ben Franklin. This is an inadequate explanation for not making any attempt to contact or schedule a bargaining session for the entire summer of 2007. I do not intend to suggest that the Respondent's lack of interest in bargaining throughout the summer of 2007 was the fault of the Union. But an assertion that a party has engaged in an overall course of bad-faith bargaining must be assessed in the context of the bargaining demands and requests put to it by the other party. Bargaining conduct that may be deemed dilatory in circumstances where the other party is pressing to bargain may be passable in circumstances where the parties are content to bargain on a more infrequent basis. Inaction in the face of inaction does not prove a course of overall surface bargaining. The Union's inaction leaves the Union, and the General Counsel, in no position to complain that the Respondent was bargaining without intent to reach an agreement.

When Schaubschlager wrote to Mueller on August 30, he sought a meeting with Mueller for September 18. Requesting but not receiving a reply by September 14, Schaubschlager wrote Mueller again, reiterating the request and accusing him of refusing to bargain. Schaubschlager filed a new unfair labor practice charge against the Respondent on September 17, alleging a refusal to bargain by the Respondent.

Mueller did not show up for the September 18 meeting but called Schaubschlager that day, professed that faxes were not a reliable way to contact him, and agreed to meet October 2. Although delayed because of a doctor's appointment this meeting took place on October 2. The General Counsel points out that Mueller arrived with no notes or proposal, but by Schaubschlager's account they had a bargaining session that was of typical length for the parties and they discussed the issues seriously. At this meeting, Mueller told Schaubschlager that he had received the request for information that Schaubschlager had sent him the previous week and that the documents were being compiled and would be sent to him.

Again, up to this point, the evidence does not support the complaint allegations of surface bargaining or failure to bargain generally. It would have been better bargaining practice for Mueller to make sure he attended the September 18 meeting. But after more than 2-1/2 months without contact, reviving the relationship might well not be flawless. Mueller did contact Schaubschlager, they arranged a bargaining session, the parties met. It appeared to be productive session. Indeed, 2 days later the Union's counsel provided the Respondent's counsel with a collective-bargaining proposal and proposal to settle the pending unfair labor practice cases. In short, the evidence does not persuade that the Respondent was simply "going through the motions" and bargaining without intent to reach an agreement.

Of course, everything changed as of October 4. On that date the Respondent's new counsel submitted a position statement to the Region regarding the Union's September 17 refusal to bargain charge. In that letter counsel took the position that the Respondent would not further negotiate until the refusal to bargain charge was "resolved." This was reiterated, and expanded, in an October 12 letter to the Region in which counsel declared that Mueller would not negotiate with the Union "until the charges filed against him by the NLRB with respect to [all of the pending cases] have been resolved."

These declarations are straightforward, "per se" refusals to collectively bargain, and violations of the Act without regard to the Employer's subjective good or bad faith. As the Supreme Court explained in the seminal case of *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962), Section 8(a)(5), as defined in section 8(d), "clearly . . . may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*—'to meet * * * and confer'—about any of the mandatory subjects." (Court's emphasis and asterisks.) There is nothing about filing an unfair labor practice charge that suspends the duty to bargain. It has long been violative of the Act to refuse to bargain until unfair labor practice charges are withdrawn.[26]

No doubt in furtherance of its newly announced position refusing to bargain, the Respondent never provided the documents requested by Schaubschlager on September 26. All of the requested information concerned bargaining unit employees and their terms and conditions of employment, and as such was "presumptively relevant." *Postal Service*, 350 NLRB No. 43,

[25] Mueller claimed to the Region in pretrial position statement that he attended the meeting, but Schaubschlager did not show up, adding to his view that the Union had lost interest in bargaining. At trial, and on brief, the Respondent's counsel asserted that Mueller went to meet Schaubschlager on June 26. In fact, whether through inadvertence or design, there is no admissible evidence on this point.

[26] *J. Sullivan & Sons Mfg. Corp.*, 102 NLRB 2, 18–19 (1953) (employer violated 8(a)(5) when it "conditioned the continuation of bargaining upon the Union's withdrawal of the unfair labor practice charge"). See also G*loversville Embossing Corp.*, 314 NLRB 1258, 1264 (1994), citing *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986) (unfair labor practice to condition execution of a collective-bargaining agreement on a party's willingness to withdraw or settle an unfair labor practice charge); *Hilton's Environmental, Inc.*, 320 NLRB 437, 455–456 (1995) (unlawful to "condition any final agreement on withdrawal [of unfair labor practice charge] because the question of withdrawing charges is a nonmandatory subject of bargaining").

slip op. at 44 (2007). Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Brooklyn Union Gas Co.,* 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.,* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

In considering the General Counsel's surface bargaining claims, I must consider the straightforward "per se" October refusal to bargain and failure to provide requested information as part of the totality of the Respondent's conduct. Yet these are discrete violations, and represent a stark change in the Respondent's bargaining conduct, but only as of October 4. It is unproven, and implausible to rely on these violations as evidence of surface bargaining preceding October 4.

Similarly, the Respondent's conduct away from the table provides little to no support for the General Counsel's surface bargaining allegations. The various 8(a)(1) threats and interrogations bear no obvious relationship to its bargaining conduct, and two of four of these violations took place in the fall of 2006, *before* months of *good-faith* bargaining between the parties. It is true that the Respondent took advantage of the discharge of LaMont and Doty to claim to the Region on July 12 that with only one remaining bargaining unit employee it had no duty to bargain. However, this claim was never made to the Union (precisely because the Union and the Company were not attempting to negotiate with each other during the summer of 2007), and the claim was abandoned and not revived when the Respondent hired additional employees to replace LaMont and Doty beginning in late July 2007. (See Tr. at 59–60.) Here, the "away-from-the-table" conduct adds little to the evidence offered of surface bargaining conduct "at the table."

In sum, the contention that the Respondent engaged in surface bargaining rests on an extremely limited premise: the lack of meetings from April 18 through October 2, which, as discussed above, does not rise to the level of dilatory bargaining conduct evidencing bad faith bargaining. The General Counsel's surface bargaining case does not rely on even the suggestion that the Respondent's conduct at the bargaining table involved the advancing of untenable proposals, regressive bargaining, reneging on tentative agreements, or unjustifiable intransigence. None of this—all standard fare in surface bargaining cases that seek to prove that a party is simply going through the motions of bargaining without a sincere intent to reach an agreement—is part of the General Counsel's case. Indeed, other than the Union's October 2 offer, no bargaining proposals were introduced into evidence. Under these circumstances, I reject the Respondent's surface bargaining claims.

I do find, however, that the Respondent violated Section 8(a)(5) of the Act by refusing, as of October 4, to bargain until the unfair labor practice charges pending against it were resolved, and by failing and refusing to provide requested and relevant information to the Union. I recognize that neither of these "per se" violations was alleged in the complaint as an independent violation of the Act. However, the Board may find an unalleged violation "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). In this case both prongs of this test are met with regard to the refusal to bargain and the failure to provide requested relevant information.

The facts of the refusal to bargain were alleged as an indicia of surface bargaining in an amendment to the complaint offered at the outset of trial,[27] and thus, the allegation is "closely connected" to the pled 8(a)(5) case. The "determination of whether a matter has been fully litigated rests in part on whether . . . the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Pergament,* supra at 335. The refusal to bargain allegation was fully litigated because the sum of the evidence is the admissions contained in the Respondent counsel's letters to the Region. See *Pergament,* supra (stating that closely connected/fully litigated rule "has been applied with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses). There is no reasonable evidence that the Respondent could rely upon to counter its own written admissions.

The refusal to provide information is closely connected to the subject matter of the complaint. Indeed, the issue of the information request was discussed at the parties' October 2 bargaining session, a session which was explicitly alleged in the complaint (par. 16(g)) as part of the surface bargaining allegations. The issue was "fully litigated" as well. The failure to provide the information was not only undisputed, but the Respondent counsel's letter (GC Exh. 21 at 2) makes clear that the Respondent (and counsel) were aware of the request and believed it inconsistent with the Union's filing of an unfair labor practice charge.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by its refusal to bargain as of October 4, and by its failure to provide the information requested by the Union in the September 26 information request.

C. Allegations Regarding Doty and LaMont's Terminations (Paragraphs 6–11 of the Complaint)

The Government alleges that the terminations of Doty and LaMont violated the Act. It offers two distinct theories in support of these claims.

First, the General Counsel contends that the Respondent terminated LaMont and Doty for engaging in activities protected by Section 7 of the Act, namely, disputing Mueller's pay practices and, in furtherance of this dispute, requesting to see their timecards. Under this theory, the General Counsel alleges that the discharges in retaliation for disputing Mueller's pay practices violated Section 8(a)(1) of the Act. Second, and separately, the General Counsel alleges that Doty and LaMont were terminated in violation of Section 8(a)(3) as part of an effort by the Respondent to diminish the number of employees in the bargaining unit to the point that it could eliminate its bargaining obligation.

[27] At the commencement of trial, the General Counsel moved to amend the complaint to add par. 16(h), alleging the refusal to bargain as an indicia of bad-faith bargaining. The Respondent objected on grounds of timeliness. I granted the amendment but indicated to the Respondent that if, because of the amendment, it needed additional time to prepare it should make the request and I would be inclined to grant it. That offer was available but not acted on by the Respondent.

Section 8(a)(1) of the Act states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [of the Act]. 29 U.S.C. § 158(a)(1). Rights guaranteed by section 7 include the right to engage in "concerted activities for the purpose . . . of mutual aid or protection." 29 U.S.C. § 157. An employee's discharge independently violates Section 8(a)(1) of the Act where it is motivated by employee activity protected by Section 7. "[A] respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB No. 77, slip op. at 6 (2007) (quoting, *Meyer Industries*, 268 NLRB 493, 497 (1984)).

Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer's discharge of employees for the purpose of thwarting its bargaining obligation and eliminating the union violates Section 8(a)(3). As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006).

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management. Corp.,* 462 U.S. 393, 395 (1983) (approving *Wright-Line* analysis); *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) ("*Wright Line* applies to all 8(a)(3) and 8(a)(1) allegations that turn . . . on employer motivation"). In *Wright Line,* the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. Proof of such unlawful motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts,* 340 NLRB 846, 848 (2003). This includes proof that the employer's reasons for the adverse personnel action were pretextual. *Rood Trucking Co.,* 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB,* 56 F.3d 224, 229 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (internal quotations omitted)).

Under the *Wright Line* standards, the General Counsel meets his initial burden by showing "'(1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action.'" *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (quoting *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994)).

Such a showing proves a violation of the Act subject to the following affirmative defense available to the employer: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line,* supra. For the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the action in question or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB No. 79, slip op. at 10 (2006). In the face of the General Counsel's meeting of its initial burden, in order for the employer to avoid a finding of violation, it must "persuade" by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct. *Carpenter Technology Corp.,* 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities"); *Weldun International*, 321 NLRB 733 (1996) ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence") (internal quotation omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998).

When evaluation of the General Counsel's initial case, or the Respondent's defense, includes a finding of pretext, this "defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.,* supra at 898; *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002). "This is because where 'the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.'" *Rood Trucking,* supra, citing, *Golden State Foods Corp.,* 340 NLRB 382, 385 (2003).

I would add here that the *Wright Line* analysis is inapplicable in 8(a)(1) cases where "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965 (1981). Such cases, "involve[ ] discipline of an employee for conduct that was part of the res gestae of protected activity," and the employer's motivation is not at issue. *General Motors,* supra at fn. 3. The issue in such cases often is whether "the employee used language so offensive as to remove the Act's protection." Id.

1. The 8(a)(1) theory

The General Counsel's 8(a)(1) theory involves the claim that LaMont and Doty were terminated for investigating and disputing the Respondent's wage and pay practices, specifically, Mueller's practice of altering timecards submitted by employees.

In the case of Doty, the Respondent contends that he was discharged for conduct completely unrelated to the pay dispute, i.e., his conduct at the American Legion Post. Thus, as the employer's motivation for the discharge is squarely at issue, *Wright Line* clearly applies.

With regard to LaMont, the applicable legal standard for the 8(a)(1) discharge case is more complicated.

The Respondent attributes the discharge chiefly to LaMont's conduct at Recht's house, conduct that the Respondent asserts is unprotected. The General Counsel contends that LaMont's overall activities in pursuit of the pay dispute motivated the discharge. The General Counsel suggests that the events at Recht's house are being used by the Respondent as a pretext for the discharge, an assertion regarding the Employer's motivation that makes a *Wright Line* analysis directly applicable.

However, the General Counsel primarily argues on brief that, assuming that LaMont's conduct at Recht's home was Mueller's motivation for the discharge, that conduct was protected conduct regarding the pay dispute and not conduct for which LaMont would lose the protection of the Act. Thus, the General Counsel contends that, assuming the Respondent's version of its motivation, "the very conduct for which" LaMont was "disciplined is itself protected concerted activity" (*Burnup & Sims, Inc.,* supra) and "conduct that was part of the res gestae of protected activity." *General Motors,* supra. Under this analysis the Respondent's motivation for the discharge is not at issue and the outcome turns on whether LaMont's conduct at Recht's house put him outside the ambit of the Act's protection. *Wright Line* is inapplicable to this inquiry.

Given these alternative arguments, I will first use *Wright Line* to analyze the motivation for LaMont's discharge. If the General Counsel meets his initial burden and shows that LaMont's protected activity (apart from any conduct at Recht's home) was a motivation for LaMont's discharge, the burden will shift to the Respondent to show that in the absence of protected activity it would still have discharged LaMont, as it claims, for his conduct at Recht's house. If the Respondent's contention is found to be a pretext, or if it is found to be a motive, but not shown by the Respondent to have been a motive it would have acted upon in the absence of LaMont's other protected activity, then the Respondent has failed to meet its burden and a violation will be found. In that case, the protected or unprotected nature of LaMont's conduct at Recht's home is irrelevant.[28]

If I conclude that the General Counsel has failed to meet his initial burden, or if he does but the Respondent shoulders its burden of demonstrating that it would have terminated LaMont for his actions at Recht's house, even in the absence of protected activities, then the *Wright Line* analysis, of course, will come out in favor of the Respondent. At that point, it will be necessary to examine the nature of LaMont's conduct at Recht's house. If LaMont's actions at Recht's house are, in fact, the sole motive for the discharge, or (under *Wright Line's* burden shifting analysis) a motive that would have been acted upon by the Respondent even in the absence of protected activity, then the legitimacy of the discharge turns on whether LaMont's conduct at Recht's was protected or unprotected. If unprotected, then the Act was not offended by the discharge. If, however, that conduct was within the ambit of the Act's protection, then we have a case where "the very conduct for which employees are disciplined is itself protected concerted activity" (*Burnup & Sims, Inc.,* 256 NLRB 965 (1981)), and the discharge was violative of the Act.

a. Application of the Wright Line analysis

The first element under *Wright Line* that must be established by the General Counsel is that employees were engaged in protected activity. As referenced, supra, Section 7 of the Act provides that activities, to be protected by Section 7, must be "concerted" and undertaken for the purpose of collective bargaining or other "mutual aid or protection." 29 U.S.C. § 157.

The "mutual aid or protection" clause of Section 7 guarantees employees "the right to act together to better their working conditions." *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962). "The conditions of employment which employees may seek to improve are sufficiently well identified to include wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities and the like." *New River Industries v. NLRB,* 945 F.2d 1290, 1294 (4th Cir. 1991). The purpose of LaMont and Doty's efforts to uncover Mueller's wage and payroll practices falls squarely within the scope of Section 7. LaMont discovered the issue but soon enlisted Doty (and attempted to enlist Vandewetering) to have them seek their pay records as well. Employee conversations about a wage and payment dispute are at the core of activity covered by Section 7's "mutual aid and protection" clause. *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624 (1986) ("The Board has held that Section 7 'encompasses the right of employees to ascertain what wage rates are paid by their employer, as wages are a vital term and condition of employment'") (quoting, *Triana Industries, Inc.*, 245 NLRB 1258 (1979)). When LaMont solicited the other employees the inquiry was an effort to uncover Mueller's wage and pay practices for the benefit of all employees. LaMont was not asking Doty and Vandewetering to seek their timecards to advance his own personal interest but to benefit all of them. Indeed, when he urged Doty and Vandewetering to check their timecards, LaMont had already determined that Mueller's deduction of drive time was the chief source of the discrepancy, a view Mueller shared, and an issue that would have affected all employees. It should also not be forgotten that, at Doty's suggestion, LaMont called the Union to report his concerns over the pay issue. This, at a time that the Union and the Employer

[28] *New York University Medical Center*, 261 NLRB 822, 824 (1982) (unnecessary to reach question of whether activity was protected where employer failed to meet its *Wright Line* burden of showing that employee would have been discharged for allegedly unprotected activity in the absence of other protected activity that was a motivating cause of discharge), enf.. denied on other grounds 702 F.2d 284 (2d Cir. 1983). See *Waste Management of Arizona*, 345 NLRB 1339, 1340 (2005) (applying *Wright Line* to determine whether employer would have terminated employee for his unprotected conduct in the absence of his protected activity); *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000) (remanding case for the judge to determine under *Wright Line* whether a disloyal flyer would have caused employer to discharge employee in the absence of other protected activity).

were under a statutory duty to collectively bargains precisely such matters. For this reason alone, employee activity related to the pay dispute and reported to the Union as a dispute with the employer, meets the statutory definition of activity "undertaken for the purpose of collective bargaining" and, therefore, is an explicitly recognized and essential form of "mutual aid and protection."

The activity over the pay dispute was also carried out in "concerted" fashion. An employee acting solely on his own behalf is not engaged in concerted activity. However, "[i]t is well settled that the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity. Such individual action is concerted as long as it is engaged in with the object of initiating or inducing . . . group action." *Phillips Petroleum Co. & Paper*, 339 NLRB 916, 918 (2003) (internal quotations and footnotes omitted); *Service Employees Local 1,* 344 NLRB 1104, 1105–1106 (2005) ("attempt to initiate or induce group action among his coworkers to confront . . . their employer[ ] about their shared concerns over the changes clearly constituted concerted activity protected by Section 7 of the Act"). See generally *Meyers Industries,* 268 NLRB 493 (1984), and *Meyers Industries (Meyers II),* 281 NLRB 882 (1986). However, the object of inducing group action need not be express. *Plumbers Local 412,* 328 NLRB 1079, 1081 (1999).

In this case, LaMont's concern about the Respondent's calculation of pay and alteration of timecards may have begun as an individual concern, but only 3 days after Mueller confirmed LaMont's suspicions, LaMont contacted both of the other bargaining unit employees to have them initiate action regarding the Respondent's pay policies. LaMont explained the situation to Doty and exhorted him, successfully, to request his own pay records to "see if it happened to him as well." Doty actually referenced his discussions with LaMont when he called the Respondent's offices to request his pay records. LaMont also left a message for Vandewetering suggesting the same course of action. Doty and LaMont discussed these issues and Doty suggested that LaMont apprise the Union of the situation. LaMont did so. Doty also suggested that the police be contacted. LaMont took action on that front at the time he was discharged. It is telling that Mueller recognized and tried to stop the concerted nature of the employees' activities: the day after Doty contacted Ben Franklin to request his pay records, Mueller directed LaMont "to no longer talk with Don about this issue." It is precisely the concerted aspect of the activity that Mueller sought to end.

This coordination between employees, the mutual offering and taking of suggestions for action, the carrying out of their jointly conceived suggestions for action, not to mention the contacting of their union representative, goes well beyond the Board's minimum standards for establishing concerted activity. See *Meyers II,* supra at 887, quoting and approving *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951) (""Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization""); *Palco,* 325 NLRB 305 (1998) (once employee informed coworker about refusal to drive truck he perceived as unsafe and coworker protested reassignment of truck to him, refusal was concerted activity), enf. denied 163 F.3d 662 (1st Cir. 1998).[29] Indeed, the discussion of salaries has been termed by the Board "an inherently concerted activity clearly protected by Section 7 of the Act." *Automatic Screw Products Co.,* 306 NLRB 1072 (1992), enfd w/o op. 977 F.2d 582 (6th Cir. 1992).

Having established that Doty and LaMont were engaging in protected activity regarding the pay dispute, the second prong of the General Counsel's initial burden is easily established: at least by Friday June 8, the Respondent was aware of their protected activity, and in particular, its concerted nature. As discussed, supra, it was on this day that Mueller unlawfully ordered LaMont "to no longer talk with Don about this issue." Obviously, as of June 8, Mueller knew that LaMont and Doty were engaged in a concerted effort to agitate over the pay records issue. He ordered them to stop.

Finally, in order to satisfy his initial burden, the General Counsel must show that the employees' protected activity was a substantial or motivating reason for its discharge of the employees. With regard to this aspect of the General Counsel's case, and any affirmative defense advanced by the Employer, Doty and Lamont's discharges are best considered separately, as the evidence, in part, is different for each.

(1) Doty's termination

The Respondent's position, to which Mueller testified, is that Doty was discharged because of the incident at the American Legion Post, which Mueller learned about no later than mid-April. According to the Respondent, the pay issue had nothing to do with Doty's termination.

The evidence suggests otherwise. For one thing, the role of the pay dispute in Doty's discharge can be inferred based on the Respondent's unfair labor practice, discussed supra, in which Mueller pointedly and unlawfully ordered LaMont not to discuss *this very protected activity*—the pay dispute—with Doty. This immediate, unlawful reaction to the knowledge that the employees were acting in concert on this issue, by itself, provides evidence of animus towards the employees' involvement in the pay dispute and therefore a basis for inferring that the protected conduct played some role in the decision to terminate the employees.

[29] Notably, the First Circuit's refusal to enforce the Board's order in *Palko* was based on the absence in *Palko* of circumstances that are present in the instant case. Thus, the court pointed out that in complaining about the safety of his truck, the discharged employee in *Palko* did not urge another employee to complain to management, nor were the complaints a "manifestation of group activity." 163 F.3d at 666. Indeed, the court pointed out that the action desired by the discharged employee—giving a truck he considered unsafe to another employee—would have been to the detriment of the other employee. Id. By contrast, in the instant case, in his discussion with Doty, LaMont explained the problem and urged Doty to contact management to seek out his time records. At the same time, Doty encouraged LaMont to contact the Union. Unlike the situation described by the court in *Palko*, Doty and LaMont's interests were aligned and they were each, after consultation with each other, working to ferret out the Respondent's pay practices.

Beyond this, however, the Respondent's explanation for Doty's discharge suggests a pretext. It is easy to accept that the incident at the American Legion would have upset Mueller, who had taken steps to make sure that employees knew they were not to solicit business for themselves while working for Ben Franklin. Doty even explained to Fiedler why the Post should prefer him over Ben Franklin for the upcoming remodeling. If Mueller had, upon learning of this incident, called Doty and fired him, the General Counsel would be hard pressed to attribute it to Doty's protected activity. But Mueller did not fire Doty when he learned of this incident. He did not discipline Doty. He did not even mention it to him. He took no action at all. Of course, Mueller says he "just never called him back to work" because of the incident. According to Mueller, "[i]n my mind he was terminated, officially on paper he wasn't terminated." But I think that point is limited in its exculpatory power.

It feels like an after-the-fact explanation. There is no objective or contemporaneous support for it. The fact is that Doty remained on the payroll and in possession of Ben Franklin property, including a truck, and was expected to be available to take calls for Ben Franklin. That remained the case, throughout this entire period from April to the end of June. Whether or not Mueller chose to call upon Doty during this period, it is clear, objectively, that Mueller was not terminated. I cannot accept the Respondent's contention that, despite appearances (the truck in front of the house, the employee on call), we should accept his subsequent declaration that "in my mind" Doty was terminated.[30] With this testimony Mueller began a series of evasions in his discussion of his actions toward Doty.

The fact is, Mueller took action against Doty *only* after Doty called into the office on June 8, 2007, and requested copies of his timecards, identifying to Norrgard that he was calling based on concerns raised by LaMont. *This* sparked action on Mueller's part, almost immediately. The very next day, Mueller unlawfully warned LaMont not to talk to Doty about the timecards and then left a message for Doty saying that he was coming to pick up the Ben Franklin truck from his house. The day after that, Mueller picked up the truck and other Ben Franklin property, which meant that, for the first time, Doty was without the implements to perform work for Ben Franklin. This was the first change in his status since his diminishment of hours which had been the status quo for nearly 6 months, and a full two months since Mueller learned of the incident at the American Legion Post. The nearly immediate reaction by Mueller after learning of Doty's involvement in the pay dispute, particularly in light of his inaction when he learned of Doty's involvement in the American Legion incident, strongly suggests that the pay dispute was the real and unlawful motive for the actions taken against Doty. This "timing" supports the General Counsel's prima facie case. The Board has long recognized that "the timing of [a] Respondent's decision and its implementation strongly support an inference of unlawful motive." *Electronic Data Systems,* 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d. 801 (5th Cir. 1993). *North Carolina Prisoner Legal Services,* 351 NLRB No. 30, slip op. at 5 (2007), citing, *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004) (timing of employer's action in relation to protected activity provides reliable evidence of unlawful motivation) and *La Gloria Oil & Gas,* 337 NLRB 1120, 1124 (2002), enfd. mem. 71 Fed. Appx. 441 (5th Cir. 2003) (decision occurred "closely on the heels" of protected activity, illustrating employer's "desire to cut any budding [protected] activity").

I reject Mueller's testimony at trial that he was motivated to pick up the truck because Doty said grass was growing around the truck and he needed to mow the grass. Mueller first testified that Doty told him this: "Yes, he indicated to me that grass was growing around his truck, and so I said I would go out and pick it up so he could mow." In fact, Mueller quickly conceded that he had not talked to Doty at all. When Doty called Norrgard to request the timecards he had mentioned that grass was growing around his truck, an obvious reference to his lack of assignments and desire for more work. Norrgard passed this message, and Doty's request for his timecards, along to Mueller, who promptly repossessed Doty's Ben Franklin truck, cell phone, and uniform. Mueller's contention that he did this so Doty could mow his lawn is fatuous, and reveals Mueller as something of a wisenheimer.

Mueller followed up the repossession of Ben Franklin property by writing to Doty, 4 days later, and telling him that "I assume that you are resigning from your position with Ben Franklin Plumbing." The letter also contained forms and information regarding Doty's right to choose COBRA coverage to continue his health insurance. Whether Mueller was simply averse to confrontation, or whether he feared that a termination letter might provoke trouble, perhaps as to the timecard issue, I am not sure. But the suggestion that Doty had resigned was, like his suggestion that he went to pick up the truck so Doty could mow the grass, disingenuous, or at best, wishful thinking on Mueller's part. Moreover, the explanation offered in the letter, and again at trial, for Mueller conclusion that Doty had resigned is itself disingenuous. Doty's decision to keep his Ben Franklin uniform and cell phone in the truck just does not suggest resignation. It is not a reasonable conclusion to draw. That was a made-up excuse to justify terminating Doty, but call it a resignation, and Mueller stuck to it at trial. I do not accept it. Approximately 1-week later, Doty called Mueller and said that, contrary to Mueller's letter, he was not resigning. Continuing his evasive, nonconfrontational posture, Mueller acknowledged that he probably responded by saying, "Ok." However, on approximately June 26 or 27, Mueller finally called Doty and told him that his services were no longer needed.

No additional explanation was provided to Doty about the grounds for the termination, and when asked why, Mueller could not give a reason for this. I believe that Mueller did not want to attribute the termination to the timecard issue, but I find that this was the "last straw" that prompted the discharge, not Doty's solicitation of work at the American Legion Post, which Mueller learned about over 2 months earlier. It is the Respondent's burden to prove that it would have discharged Doty even

[30] In terms of backpay owed to Doty, his lack of assignments may be relevant. But that is a matter to be considered in a compliance proceeding, along with the fact that new employees were hired after Doty's termination.

in the absence of Doty's protected activity. The evidence, and the timing in particular, points the other way. Even if the Respondent *could have legitimately* terminated Doty for the Legion Post incident, the Respondent has failed to show that the incident was a basis for Doty's discharge, much less that it would have terminated Doty in the absence of his heeding of LaMont's exhortation to call Ben Franklin and request his timecards. Indeed, given that the incident was ignored for months until Doty called seeking his timecards, and was not even mentioned to Doty in connection with his termination at any time, the explanation has characteristics of a pretext seized upon after the fact to justify the termination at trial. I find that Mueller decided to terminate Doty when he learned that Doty had called in and requested his timecards. I conclude that with the repossession of the truck on June 9, Doty was effectively terminated. The suggestion to Doty that he had resigned and the final call to Doty telling him that he was no longer needed were simply the wrapping up of the termination process. I conclude that the Respondent's termination of Doty was motivated by Doty's protected conduct and, accordingly, a violation of Section 8(a)(1) of the Act.

(2) LaMont's termination

Before terminating Doty, Mueller terminated LaMont. LaMont had worked steadily for Mueller since his recall in March, and unlike Doty, his termination did not lack for confrontation. As with Doty, the issue of the pay dispute played a central role.

The Respondent asserts that its discharge of LaMont was the product of building dissatisfaction with LaMont. But the precipitating event, according to the Respondent, was the incident at Terry Recht's house, reported to Mueller by Recht the next morning. Mueller testified that he terminated LaMont [f]or backstabbing me and disparaging the Company. . . . Well, when he called me a crook, a cheat, and that I was stealing the timecards from and all these things were going on. And when he spread it over to one of my friends at BNI [the Business Networking group], it was, for me, like the last straw." In his letter discharging LaMont, Mueller states that LaMont told Recht that

> Mike Mueller was cheating him by taking time off on Steve's timecards, and that Mike was crooked. Steve then took out copies of his timecards and actually showed them to the client, an attempt to make his case.

According to the termination letter, this was the basis for the LaMont's termination. On brief (R. Br. at 21), the Respondent states that "Mueller terminated LaMont for a culmination of reasons, none of which related to the ongoing timecard dispute with LaMont or LaMont's other union activities or sympathies."

The evidence suggests otherwise. It is clear that the employees' consternation over the altered timecards concerned and alarmed Mueller. It was Mueller's defensiveness over this issue that caused him, when first confronted about the pay dispute by LaMont on June 5, to tell him that "I know I shouldn't have been doing this." It was Doty's call to the office to check on his timecards that resulted in Mueller's unlawful directive to LaMont on June 8 "to no longer talk with Don about this issue," and that resulted in Mueller's decision to discharge Doty. On June 12, the confrontation resulting in LaMont's firing began with Mueller's demand, and LaMont's refusal, that LaMont certify the accuracy of each timecard, including the ones that Mueller had altered. When LaMont refused to do this and attempted to return to his service calls, Mueller ordered LaMont to do so. He said, "I'm ordering you and I'm demanding you to go in the office and initial-off on these stating that these timecards are right. I'm not paying you another dime until you do this." LaMont again refused, by indicating that it "sounds to me if you're not gonna pay me another dime, you're firing me." Mueller said, "I'm not firing you, I'm laying you off then." Only then, as LaMont prepared to leave and accept the layoff, did Mueller raise the incident at Recht's. Mueller pressed LaMont to admit what had happened, repeating that LaMont knew he did something stupid yesterday. LaMont admitted, "Yeah, I showed her the timecards." Mueller then said, "All right, you're fired. Get out of my office. Get out of here now."

The Respondent contends that after learning of the Recht incident, Mueller decided to terminate LaMont, and called him into the office to order him to "sign off" on the timecards so that he could "resolve" the timecard issue before firing him for disparagement. The Respondent's somewhat unseemly claim is that Mueller was using his leverage as employer to require LaMont to verify timecards that he did not agree were accurate, but planned to fire him immediately afterwards because of his conduct at Recht's home.

I do not accept the General Counsel's position that the incident at Recht's house was wholly pretextual. It angered Mueller. According to LaMont, he had talked to Mueller the morning of his discharge after his first call of the day and Mueller had been pleased with a sale LaMont had made. There was no inkling of discord. It was only later in the morning, no doubt after Mueller heard from Recht, that LaMont received a call to come back to the office. It was then that Mueller demanded that LaMont initial the timecards, and the ensuing dispute resulted in LaMont's termination. Thus, the Recht incident appears to have played a role in the timing of the meeting with LaMont and thus in the timing of his discharge.

But if the Recht incident was not pretextual it was not the only motive for the discharge. In other words, LaMont's discharge was a dual motive discharge as *Wright Line* explained the term. That being so, I do not believe the Respondent has proven that it would have fired LaMont in the absence of his other protected and concerted activity surrounding the pay dispute. To begin with, as noted, Doty was fired for his involvement in the pay dispute—and nothing else—and that process, beginning with the repossession of the truck was already underway when LaMont was terminated. LaMont's involvement in the pay dispute was far more central, and far more challenging to the Respondent than Doty's. It is, in fact, unlikely that Doty would be terminated for involving himself in the pay dispute, but LaMont would get a pass on that issue. Moreover, the final confrontation with LaMont does not have an inkling of the predetermination to terminate LaMont that the Respondent claims. To the contrary, the termination sounds like an impulsive reaction to the confrontation that developed when LaMont refused to approve the altered timecards. At that point they

argued and Mueller told LaMont he was "laid off" and then changed it to "you're fired" after LaMont admitted to showing Recht the timecards, something Mueller already knew about. Under the Respondent's version, the "laid off" comment was a ruse, designed to force LaMont to vouch for the accuracy of the altered timecards. Frankly, I do not judge Mueller to be that calculating or cold. But I think the Respondent feels that the "disparagement" issue is a stronger grounds for discharge than the pay dispute. However, the conversation highlights the importance of the pay dispute to the discharge. Undisputed is that Mueller was willing to tell LaMont, either as a plan or in a fit of anger, that he was being "laid off" for refusing to agree, essentially, to drop the pay dispute and certify that the timecards were correct. That, by itself, is a remarkable unfair labor practice, escaping notice only because a suspension converted to a discharge in the same conversation is overshadowed. But it demonstrates the force of the Respondent's animus towards LaMont's involvement in and creation of the pay dispute, and it demonstrates the Respondent's willingness to act on that animus. It is a tall order for the Respondent to separate out the heated conversation, threats, and animus regarding the pay dispute on display in Mueller's *final* discussion with LaMont, from the termination of LaMont occurring in the same conversation. That is, under *Wright Line*, the Respondent's burden. The Respondent has failed to demonstrate that absent LaMont's protected and concerted activity around the pay dispute it would have terminated LaMont.

b. Was LaMont's conduct at Recht's home unprotected?

Utilizing a *Wright Line* analysis, I have found that the Respondent has failed to persuade by a preponderance of the evidence that it would have terminated LaMont in the absence of the pay dispute. That makes unnecessary the need to determine whether LaMont's conduct at Recht's home constituted disparaging and disloyal unprotected activity for which he could have been (and, according to the Respondent, was) discharged. However, given the centrality of the contention to the Respondent's case, I will consider the issue.

"Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations." *NCR Corp.,* 313 NLRB 574, 576 (1993). "[T]he Board has found employee communications to third parties seeking assistance in an ongoing labor dispute to be protected where the communications emphasized and focused upon issues cognate to the ongoing labor dispute." *Allied Aviation Service Co.,* 248 NLRB 229, 230–231 (1980), enfd. w/o op. 636 F.2d 1210 (3d Cir. 1980); *Five Star Transportation,* 349 NLRB No. 8, slip op. at 4 (2007) ("employees do not lose their Section 7 protection simply because they seek 'to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship'") (quoting *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978)).

In considering LaMont's conduct, it must first be acknowledged that his comments to Recht were very much a part of and about the pay dispute. His repeated comment—in response to Recht's inquiry about how he liked working for Mueller—that it would be nice to work for someone who was "honest" and had "integrity" was directed toward his concern about Mueller's actions in the pay dispute. Indeed, as the Respondent put it, in "an attempt to make his case" LaMont "took out copies of his timecards and actually showed them to [Recht]." Thus, LaMont's comments were not attacks on Mueller or Ben Franklin *unrelated* to an ongoing labor dispute. They were about the labor dispute. As discussed, supra, that goes a long way to bring the dispute within the ambit of protected activity.[31]

However, not all communications to third parties are considered protected. For instance, "employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected." *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Even when the communication to a third party is related to an ongoing labor dispute, the Board evaluates whether the communication is "so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006). As the Board recently explained, "[i]n determining whether employee conduct falls outside the realm of conduct protected by Section 7, we consider whether 'the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining of its reputation . . .'" *Five Star Transportation*, supra at slip op. at 4 (quoting *Vandeer-Root Co.*, 237 NLRB 1175, 1177 (1978)).

Here, LaMont's discussion of his timecards and the pay dispute falls short of comments that could be considered flagrantly disloyal. The only part of LaMont's comments that warrant discussion are his repeated remark that it would be nice to work for someone who was honest and had integrity. With regard to these comments, the context should not be forgotten. LaMont was sincerely moved by the generosity and hospitality of Recht who cooked her own employee breakfast and asked LaMont to

[31] Under Board precedent, it is clear that the pay dispute qualifies as a "labor dispute." As the Board explained in *Endicott Interconnect Technologies*, 345 NLRB at 450:

> in applying the *Jefferson Standard* doctrine, the Board relies on the definition of a "labor dispute" in Section 2(9) of the Act. That section states:
>
> > The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.
>
> In short, this definition comprehends disputes concerning either employment conditions or representation for collective bargaining. The presence of an organizing union or a collective-bargaining relationship is not required. There need not be an ongoing strike or picketing. All that is required is a controversy that relates to terms or conditions of employment. . . .
>
> [T]he presence of a union is not required to establish that a labor dispute exists. The most casual reader of the article would recognize that the layoff involved a controversy between management and employees concerning employment conditions. Thus, there was an identifiable labor dispute.

join them. They talked, and she asked him how he liked working for Mueller. LaMont told her, but as Recht testified, "He didn't respond about Mike. He just said that he would like to work for someone that was honest and something about integrity." LaMont repeated this several times.

Contrary to the Respondent's characterization of the incident, I have found that LaMont did not tell Recht that Mueller was a "crook" or "crooked" or had "cheated" him. I have found that Recht did not tell Mueller that LaMont said that. There is no doubt that LaMont's answer reflected poorly on Mueller, and was intended to, and yet it strikes me as the opposite of inflammatory. If the answer was not what Recht hoped, it must be said that if it is permissible to answer without losing the protection of the Act, LaMont did so in a non-inflammatory way. Indeed, in context it was—in part—a compliment to Recht, who obviously impressed LaMont, as well as a negative comment on Mueller. It was intended to convey the problem with Mueller's conduct, in LaMont's view, and it was linked forthrightly and exclusively to the dispute over terms and conditions of employment, and Mueller's dealings with the pay issue. By all evidence there were no negative references to Mueller other than in reference to the pay dispute. And there was no disparagement of any kind of Ben Franklin's products, services, abilities or anything else unrelated to the labor dispute.

Moreover, the limited, almost private nature of the communication is important. The Board has recognized that in assessing whether arguably disloyal or disparaging conduct loses the protection of the Act, the extent of the publicity and extent of the public nature of the communication is significant. Unlike, for example, a mass mailing, LaMont's comments were made in a one-on-one conversation in Recht's home, over (and after) breakfast. This militates strongly in favor of finding that LaMont did not lose the protection of the Act. See *Mountain Shadows Golf Resort,* 338 NLRB 581, 583 (2002) (pointing out that public nature of flyer, among other factors, increased justification for discipline of employee compared to private document criticizing employer that employee had previously authored).

The Respondent also takes issue with the purpose of the communication, contending (R. Br. at 22) that "LaMont was not communicating said information to Recht for the purpose of obtaining Recht's assistance with respect to an ongoing labor dispute." There is no precedent in law or logic for the proposition that the employees' statutorily protected right to communicate with third parties is so circumscribed. Whether it is merely "to solicit sympathy" (*NCR Corp.,* 313 NLRB at 576) or tangible support, the statutory right to communicate with third parties in support of legitimate goals is protected by the Act. There is no requirement that the communication be part of a formal or premeditated strategy to obtain assistance from third parties. In this case, it appears that LaMont told Recht about the problem at work because Recht asked him how he liked working for Mueller. At a minimum, Lamont was trying to "solicit sympathy" from Recht. If the communication is not otherwise sufficiently egregious to lose the protection of the Act, it is not for the Board to vet whether the attempt to "solicit sympathy" is appropriately thought through, or in the employee's best interest. In this case, obviously, it turned out to be a mistake on Lamont's part to talk to Recht about the problems at work. It did not help resolve the pay dispute. That must be beside the point. It is the discussion itself, the conveying of information to the third party as a means of informing others about the dispute that is protected. Although it obviously did not work out this way, had Recht, after hearing LaMont, urged Mueller to resolve the dispute, the decision by LaMont to educate Recht about the dispute would look very different. The Act protects the decision to communicate about the dispute without regard to whether the listener sides with the employee or the employer.

Finally, I add that LaMont's right to discuss labor issues with customers during working time could surely be limited by Ben Franklin's adoption of a nondiscriminatory rule forbidding nonwork related discussions with customers. One can imagine an employer not wanting its plumbers discussing religion, politics, labor issues, or any other nonwork issue beyond minimal courtesies while on the job. And one can imagine a rule prohibiting plumbers from sitting down to breakfast with a customer while on the job. On the other hand, an employer might well determine that such rules would stifle interactions between the plumber and customer that might be beneficial to the customer-employer relationship. After all, the customer and the plumber may, in some instances, spend several hours together. In any event, there is no evidence, and the Respondent does not claim, that any such rules exist. Both in Mueller's reaction, and in the Respondent's litigation position, there is no hint that LaMont's use of worktime at Recht's—for breakfast or for discussions—was a cause for his termination. The Respondent took issue with LaMont's particular comments, not his taking time to talk with Recht. Thus, the fact that LaMont was "on the job" when he talked to Recht is not at issue. See *Panchito's,* 228 NLRB 136 (1977) (overruling ALJ's conclusion that discussion of union during working time in presence of customers was unprotected as there is no evidence that employer had a no-solicitation rule in place); enfd. 581 F.2d 204, 207 fn. 3 (9th Cir. 1978) ("An employee may discuss unionizing on working time, absent a lawful employer rule against it."). See *Orval Kent Food Co.,* 278 NLRB 402, 405 (1986) (An employer may lawfully forbid employees to talk about a union during periods when they are supposed to be working, if that prohibition also extends to all other subjects not associated or connected with their work tasks.).

Although I do not believe I need to reach the issue, were it necessary, I would find that LaMont's conduct at Recht's home was protected activity. Accordingly, if, as the Respondent claims, the incident at Recht's home was an independent cause of LaMont's discharge, then the discharge was violative of the Act. *Burnup & Sims, Inc.,* 256 NLRB 965 (1981).

2. The 8(a)(3) allegations

Given my findings that LaMont and Doty's discharges violated Section 8(a)(1), it is unnecessary to reach the General Counsel's contention that their discharges violated Section 8(a)(3) of the Act. *Phoenix Transit System,* 337 NLRB 510 fn. 3 (2002).

CONCLUSIONS OF LAW

1. The Respondent, MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, United Association of Plumbers and Gasfitters, Local Union No. 34, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time journeyman and apprentice plumbers employed by the Respondent at or out of its North Branch, Minnesota location; excluding all other employees, guards and supervisors as defined by the Act.

4. Since on or about November 15, 2006, the Union has been the recognized and exclusive representative of the foregoing unit of the Respondent's employees.

5. On or about November 1, 2006, the Respondent violated Section 8(a)(1) of the Act by interrogating an employee regarding his union sympathies.

6. On or about November 1, 2006, the Respondent violated Section 8(a)(1) of the Act by threatening an employee with job loss for himself and other employees because of the employee's support for union representation.

7. On or about June 5, 2007, the Respondent violated Section 8(a)(1) of the Act by implying that the Respondent was reducing hours that the employee reported on his timecard because of the employees' support for the union.

8. On or about June 8, 2007, the Respondent violated Section 8(a)(1) of the Act by directing an employee not to discuss a pay issue with another employee.

9. Beginning on or about October 4, 2007, and continuing thereafter, the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Charging Party Union during the pendency of unfair labor practice charges filed against the Respondent by the Union.

10. Beginning on or about October 4, 2007, and continuing thereafter, the Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Union relevant requested information.

11. On or about June 9, 2007, the Respondent violated Section 8(a)(1) of the Act by discharging employee Donald Doty in retaliation for his protected activity in furtherance of a pay dispute with the Respondent.

12. On or about June 12, 2007, the Respondent violated Section 8(a)(1) of the Act by discharging employee Steven LaMont in retaliation for his protected activity in furtherance of a pay dispute with the Respondent.

13. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall recognize and, upon request of the Union, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees, notwithstanding the pendency of any unfair labor practice charges filed against the Respondent. The Respondent shall provide the Union with the information requested in the Union's September 26, 2007 letter, included in the record in this case as General Counsel's Exhibit 11. The Respondent, having unlawfully discharged employee Donald Doty as of June 9, 2007, and having unlawfully discharged employee Steven LaMont as of June 12, 2007, must offer Doty and LaMont reinstatement to the positions they occupied prior to their discharges, or to equivalent positions, should their prior positions not exist, without prejudice to their seniority or any other rights or privileges previously enjoyed. The Respondent shall make Doty and LaMont whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharges to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall remove from its files, including Doty and LaMont's personnel files, any reference to their discharge, and shall thereafter notify Doty and LaMont in writing that this has been done and that the discharges will not be used against them in any way.

The Respondent shall post an appropriate informational notice, as described in the Appendix, attached. This notice shall be posted in the Respondent's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 18 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, MJ Mueller, LLC d/b/a Benjamin Franklin Plumbing, North Branch, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating any employee regarding his union sympathies.

(b) Threatening any employee with job loss for himself or other employees because of employee support for union representation.

(c) Stating or implying to any employee that the Respondent is reducing hours that the employee reported on his timecard because of the employees' support for the Union.

(d) Directing any employee not to discuss a pay issue with another employee.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative for the following bargaining unit of its employees:

> All full-time and regular part-time journeyman and apprentice plumbers employed by the Respondent at or out of its North Branch, Minnesota location; excluding all other employees, guards and supervisors as defined by the Act.

(f) Failing and refusing to provide information to the Union pursuant to its request of September 26, 2007.

(g) Discharging employees in retaliation for activity protected by the Act.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, upon the Union's request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees described above.

(b) Furnish the Union with the information it requested on September 26, 2007.

(c) Within 14 days from the date of this Order, offer Steven LaMont and Donald Doty full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make employees Steven LaMont and Donald Doty whole with interest, in the manner set forth in the remedy section of this decision and order for any loss of earnings or other benefits resulting from their discharge.

(e) Within 14 days from the date of this Order, remove from its files, including Steven LaMont and Donald Doty's personnel files, any reference to their discharge, and within 3 days thereafter notify Steven LaMont and Donald Doty in writing that this has been done and that the discharge will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in North Branch, Minnesota, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2006.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 28, 2007.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist a union
> Choose representatives to bargain with us on your behalf
> Act together with other employees for your benefit and protection
> Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union sympathies.

WE WILL NOT threaten you with job loss because of your support for union representation.

WE WILL NOT state or imply to you that we are reducing hours on your timecards because of your support for union representation.

WE WILL NOT direct you not to discuss pay issues with each other.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

WE WILL NOT fail and refuse to provide the Union with requested information relevant to its duties as your representative for purposes of collective bargaining.

WE WILL NOT discharge any of you in retaliation for your activities that are protected by the Act, including the discussion of issues related to pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, recognize and, upon the Union's request, bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit employees.

WE WILL, provide the Union with the information it requested in its letter to us of September 26, 2007.

WE WILL, within 14 days from the date of this Order, offer Steven LaMont and Donald Doty full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven LaMont and Donald Doty whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Steven LaMont and Donald Doty, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

MJ MUELLER, LLC D/B/A BENJAMIN FRANKLIN PLUMBING